STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee	UNPUBLISHED April 26, 2005
v	No. 252983 Wayne Circuit Court
ISAIAH WIMBLEY, JR., Defendant-Appellant.	LC No. 03-009646-01

Before: Saad, P.J., and Fitzgerald and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right his jury conviction of five counts of first-degree criminal sexual conduct, MCL 750.520(b)(1)(b). Defendant was sentenced to 6 to 15 years' imprisonment. We affirm.

I. Evidentiary Errors

Defendant first contends that the trial court erred when it prevented him from presenting evidence of the complainant's medical history and recordings of the complainant making sexually explicit phone calls. A trial court's evidentiary decisions are reviewed for an abuse of discretion. *People v Manser*, 250 Mich App 21, 31; 645 NW2d 333 (2002). An abuse of discretion occurs only if an unprejudiced person, considering the facts on which the trial court relied, would find that there was no justification or excuse for the ruling made. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). However, whether a rule or statute precludes admission of evidence is a matter of law, which this court reviews de novo. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

A. Evidence of Complainant's Medical Condition

Before the trial court, defendant argued that he should be permitted to present evidence that the complainant had a sexually transmitted disease (STD), which he did not have, to rebut statements by the complainant that she did not have sexual relations with anyone else and to rebut testimony by a prosecution expert that there was a history of attempted sexual contact. The trial court ruled that the evidence was barred by Michigan's rape-shield statute, MCL 750.520j.

Evidence of specific instances of a victim's past sexual conduct with others is generally legally irrelevant and inadmissible under MCL 750.520(j). *People v Arenda*, 416 Mich 1, 10;

330 NW2d 814 (1982). This is because inquiries into sexual history, even when minimally relevant, carry a danger of unfairly prejudicing and misleading the jury. *Id.* MCL 750.520j(1), provides in relevant part:

> Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall not be admitted under sections 520b to 520g unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value: (a) evidence of the victim's past sexual conduct with the actor; (b) evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.

However, in certain limited situations, evidence that does not come within the specific exceptions of the rape-shield statute may be relevant and its admission required to preserve a criminal defendant's Sixth Amendment right of confrontation. *People v Hackett,* 421 Mich 338, 344, 348; 365 NW2d 120 (1984). This Court applies the rape-shield statute on a case-by-case basis to balance the rights of the victim and the defendant in each case. *People v Morse,* 231 Mich App 424, 433; 586 NW2d 555 (1998). "'In exercising its discretion, the trial court should be mindful of the significant legislative purposes underlying the rape-shield statute and should always favor exclusion of evidence of a complainant's sexual conduct where its exclusion would not unconstitutionally abridge the defendant's right to confrontation.'" *People v Adair,* 452 Mich 473, 485; 550 NW2d 505 (1996), quoting *Hackett, supra* at 349.

While complainant did make a statement to police that she had not been with anyone else other than defendant, this statement was never introduced at trial. In addition, the prosecution's expert did not testify that there was a history of attempted sexual contact, as defendant asserts on appeal. The expert testified that she performed an exam based on the allegations made by complainant, but because of the lapse in time between the alleged sexual contact with defendant and her examination of complainant, she was unable to confirm or deny any sexual abuse. Hence, there was no testimony for defendant to rebut with the evidence of complainant's medical condition. Furthermore, defendant presented no evidence that the STD would likely have been transmitted from complainant to defendant during sexual intercourse and defendant did not suggest that the evidence was necessary to show complainant's bias or ulterior motive to make a false charge. Consequently, the evidence had marginal probative value, and, because such evidence tended to suggest that complainant was sexually active with others, it presented the type of highly prejudicial evidence that the legislature sought to bar under the rape-shield statute. MCL 750.520j(1); *Arenda, supra* at 10. Therefore, the trial court did not abuse its discretion when it refused to permit defendant to present evidence regarding the complainant's medical condition.

B. Recorded Conversations

Defendant also argues that the trial court erred in excluding tape recordings of complainant's sexually explicit telephone conversations. Defendant wanted to present the recorded conversations as evidence of the complainant's ulterior motive to fabricate the charges against him. Specifically, defendant alleged that the allegations against him did not arise until after he tried to get the complainant's mother to discipline the complainant because of these

conversations. The trial court denied defendant's request stating that the tape was "totally irrelevant, prejudicial, and . . . a violation of the Rape Shield Law." The court also noted "it's really disgusting for somebody to record something like that to try to smear somebody else."[1] As stated above, Michigan's rape-shield statute, MCL 750.520j(1) bars evidence of "specific instances of the victim's sexual conduct." Our Supreme Court has interpreted MCL 750.520j(1) to include statements or references to statements made in the course of what is referred to in common parlance as 'phone sex' because they amount to a prior instance of sexual conduct. *People v Ivers*, 459 Mich 320, 329; 587 NW2d 10 (1998) (holding that, unlike "phone sex," the complainant's statements to a friend regarding her readiness to have sex did not fall within the scope of the rape-shield statute because they did not reveal any prior sexual conduct). Therefore, the trial court correctly determined that the recorded conversation fell within the prohibition of the rape-shield statute.

Even though the recorded conversation fell under the rape-shield statute and did not fall within one of the statute's enumerated exceptions, this does not end our inquiry. As already noted, a defendant has a constitutional right to present some types of evidence, such as evidence demonstrating that the complainant has an ulterior motive to fabricate charges, even when the proffered evidence does not fall within one of the rape-shield statute's exceptions. *Hackett*, *supra* at 348. In *Hackett* our Supreme Court ruled that the procedure for determining the admissibility of evidence on this ground was to hold an *in camera* hearing to determine admissibility. *Id.* at 349-350. The Court went on to state that, at the hearing, defendant is initially obligated to demonstrate the relevance of the evidence for the purpose for which it is sought to be admitted. *Id.* at 350. However, even if the evidence is relevant, "the trial court continues to possess the discretionary power to exclude relevant evidence offered for any purpose where its probative value is substantially outweighed by the risks of unfair prejudice, confusion of issues, or misleading the jury." *Id.* at 351. In the present case, the trial court listened to the tape outside the presence of the jury and on the record and ruled that the recording was of marginal relevance that was substantially outweighed by its prejudicial value. On the record before us, we see no reason to question that determination. Therefore, there was no abuse of discretion.

II. Prosecutorial Misconduct

Defendant next contends that the prosecutor engaged in three instances of prosecutorial misconduct. Defendant failed to object to two of these instances, but did object to the third. We shall first address defendant's unpreserved claims. This Court reviews unpreserved claims of prosecutorial misconduct "for plain error affecting the defendant's substantial rights." *People v McLaughlin*, 258 Mich App 635, 645; 672 NW2d 860 (2003).

[1] During the exchange regarding the admissibility of this recording, defendant's trial counsel declined to state who made the recordings, telling the trial court "you know why I would rather you make your own conclusions." In Michigan, recording the private conversations of others is a felony punishable by up to 2 years in prison. MCL 750.539c.

A. First Civic Duty Argument

Defendant first argues that the prosecutor improperly appealed to the jury's civic duty. During closing statements, the prosecutor made the following remarks:

> This is a sick, depraved situation, ladies and gentlemen. This is a situation in which we have a young girl who is powerless to defend herself, physically and mentally. Powerless to defend herself.
>
> The only thing she can do is stand out, put her hand in the air and meekly say, "help." Meekly say, "Mommy," written right there, "Mommy, help me." That's all she could do.
>
> When her mom decides to turn her back on her, what other recourse does she have? And so here she was, there she is. And what recourse does she have, ladies and gentlemen? She stands on that stand and says, "Help." That's what she's asking for.
>
> She has neither the strength, maturity, mental ability to help herself in this case. She's asking us for help. That's why we're here. That's why I'm asking you to help her.

The prosecutor closed his remarks by stating, "I'm begging you, ladies and gentlemen. You have a duty to do today. I ask that you do your duty carefully, considerably and understandably. Asking for your help. Give it to her."

While a prosecutor may not resort to civic duty arguments that appeal to the fears and prejudices of jury members, prosecutors are accorded great latitude regarding their arguments and conduct. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). For this reason, this Court will "not review the prosecutor's remarks in [] a vacuum; the remarks must be read in context." *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996). The scope of the review is important, "because an otherwise improper remark may not rise to an error requiring reversal when the prosecutor is responding to the defense counsel's argument." *Id.*

At trial, the complainant testified that she attempted to enlist her mother's help in preventing the sexual abuse, but was unable to obtain her help. Indeed, the complainant's mother actually testified on behalf of defendant. Hence, these remarks were fair commentary, based on the evidence, that the complainant had no one at home to help her. Taken in context, these remarks were not an appeal to the jury to convict based on a sense of civic duty. See *People v Wise*, 134 Mich App 82, 104; 351 NW2d 255 (1984). In fact, in his rebuttal, the prosecutor told the jury that it should convict because the facts support such a conviction, not because it has a civic duty to convict defendant. Consequently, these remarks did not rise to the level of an "argument that the jury should convict defendant regardless of the evidence." *People v Matuszak*, 263 Mich App 42, 56; 687 NW2d 342 (2004). Furthermore, while these remarks were emotional, emotional language may be used during closing argument and is "an important weapon in counsel's forensic arsenal." *People v Mischley*, 164 Mich App 478, 483; 417 NW2d 537 (1987). Even if we were to characterize these comments as an impermissible appeal to the jury to convict based on civic duty, any prejudice was cured when the trial court instructed the

jury that the closing arguments were not evidence and that any argument that was not supported by the evidence should be ignored. *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003) ("Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors."). Therefore, there was no plain error, let alone plain error affecting defendant's substantial rights.

B. Improper Invitation to Comment on Witness Credibility

Defendant next argues that the prosecution improperly sought to discredit defendant by demanding that he and his wife label the complainant a liar on cross-examination. Defendant correctly notes that the prosecution may not ask a defendant to comment on the credibility of prosecution witnesses because a defendant's opinion of their credibility is not probative. *People v Buckley*, 424 Mich 1, 17; 378 NW2d 432 (1985). However, such improper questions do not necessarily result in unfair prejudice to defendant. *Id*. (holding that where the substance of the exchange indicates that defendant dealt rather well with the questions, the Court will not find prejudice occurred). In this case, defendant and his wife handled the prosecutor's questions well. Therefore, these questions did not amount to plain error that affected defendant's substantial rights.

C. Second Civic Duty Argument

Finally, defendant argues that the prosecution improperly appealed to civic duty by stating:

> What do you think happened that afternoon? The horrible burden that the girl has had to carry. And I am begging you, members of the jury, to take that burden away. You can't take it all away, ladies and gentlemen, but you can take a large portion of it away and you can protect, hopefully, a few other girls from having to go through this as well.

This comment was improper. However, a preserved nonconstitutional error is not grounds for reversal unless defendant demonstrates that it is more probable than not that the error was outcome determinative. *Lukity*, *supra* at 495-496. Following closing arguments, the trial court instructed the jury that its job was to decide the facts and apply the law as given by the trial court, that it could only consider the evidence admitted, and that the lawyers' statements and arguments were not evidence. These instructions cured any prejudice against defendant that may have resulted from the prosecution's statements. *Abraham*, *supra* at 279.

Because the prosecutorial conduct at issue was either within the bounds of the adversarial process or had little prejudicial effect, defendant is not entitled to a new trial based on prosecutorial misconduct.

III. Instructional Error

Defendant next argues that the trial court erred during closing arguments when it described a reasonable doubt as "a doubt that's based on reason," "the kind of a doubt that you can assign a reason for having," and a "fair, honest, and reasonable doubt." We disagree. This issue was not preserved by an objection before the trial court and will be reviewed for plain error

affecting substantial rights. *McLaughlin*, *supra* at 645. While not perfect, the instructions accurately conveyed the concept of reasonable doubt to the jury. See *People v Nickson*, 120 Mich App 681, 688; 327 NW2d 333 (1982) (holding that an instruction informing jurors that a reasonable doubt was "an honest doubt based upon reason," did not improperly shift the burden of proof to defendant); *People v Jackson*, 167 Mich App 388, 391-392; 421 NW2d 697 (1988) (holding that an instruction defining reasonable doubt as a doubt founded in reason that arises from the evidence or lack thereof was not improper). Hence, there was no error.

IV. Timeframe

Defendant also argues that the trial court erred by refusing to require more specificity as to the dates of each offense. Again, we disagree. MCL 767.45(1)(b) requires that the information contain "the time of the offense as near as may be. No variance as to time shall be fatal unless time is of the essence of the offense." In criminal sexual conduct cases, especially those involving children, time is not usually of the essence or a material element. *People v Stricklin*, 162 Mich App 623, 634; 413 NW2d 457 (1987). Therefore, there was no error.

V. Cumulative Effect of Errors

Finally, defendant argues that the cumulative effect of the errors warrants a new trial even if none of them does so individually. The cumulative effect of several errors can constitute sufficient prejudice to warrant reversal where the prejudice of any one error would not. *People v LeBlanc*, 465 Mich 575, 591; 640 NW2d 246 (2002). In order to reverse on the basis of cumulative error, the effect of the errors must be so seriously prejudicial that they denied defendant a fair trial. *People v Ackerman*, 257 Mich App 434, 454; 669 NW2d 818 (2003). Only actual errors are aggregated to determine their cumulative effect. *People v Rice (On Remand)*, 235 Mich App 429, 448; 597 NW2d 843 (1999). Because our review revealed only one error, which was adequately addressed by the jury's instructions, we find no merit to this issue.

Affirmed.

/s/ Henry William Saad
/s/ E. Thomas Fitzgerald
/s/ Michael R. Smolenski